

TESTIMONY OF THE HONORABLE BOBBY WHITEFEATHER, CHAIRMAN
RED LAKE BAND OF CHIPPEWA INDIANS TRIBAL COUNCIL

Before the U.S. Senate Committee on Indian Affairs

Hearing on Indian Reservation Roads and Bridges
October 20, 1999

Good morning, Mr. Chairman, Mr. Vice Chairman, and Members of this Committee. My name is Bobby Whitefeather. I am the Chairman of the Red Lake Band of Chippewa Indians. I appreciate the opportunity to testify on Indian Reservation Roads issues, including the present negotiated rulemaking process under TEA-21.

With me is Mr. Jim Garrigan, who is the Roads Director for my Tribe. Jim retired after 32 years with the BIA roads program and came home about four years ago to work for his Tribe. He brought back to Red Lake a great deal of inside knowledge of how the BIA roads program does, and does not, work. Jim is recognized as a roads expert by many Indian tribes around the country. Accordingly, he was chosen by the Minneapolis Area tribes to be their representative on the TEA-21 Negotiated Rulemaking Committee. That Committee then elected Jim to serve as its Tribal Co-Chair.

My testimony will address five areas of great concern to the Red Lake Nation: (1) the need to revise the statutory obligation limitation to provide fair and equitable funding; (2) the BIA's mis-directed use of Indian roads funds; (3) the barriers Red Lake has encountered in its efforts to negotiate a roads self-governance funding agreement under TEA-21 with BIA; (4) the pattern of BIA conduct that has frustrated the work of the Negotiated Rulemaking Committee; and (5) the need for complete equity in the national allocation of Federal highway trust funds. But first, permit me the opportunity to describe for you the Red Lake Indian Reservation and our road system.

Background on the Red Lake Indian Reservation

Compared to other tribes, Red Lake is a medium-sized Tribe with more than 9,500 members, most of whom live on our Reservation. The Red Lake Indian Reservation is located in a rural area within the boundaries of the State of Minnesota. Our Reservation has over 840,000 acres of tribal trust land and water. While over time it has been diminished from its original 15 million acres, our Reservation has never been broken apart or allotted to individuals and lost to non-Indians.

Thanks to the wise insistence of Red Lake leaders several generations before me, our Reservation is not governed by Public Law 83-280. This means the Red Lake tribal government and the United States government have full civil and criminal enforcement responsibilities for the Red Lake Reservation, and that the State of Minnesota has neither

civil nor criminal enforcement responsibility or authority over our Reservation. As a consequence, our tribal government is responsible, in conjunction with the United States, to provide a full range of governmental services to Reservation residents. We administer transportation, police, judicial, penal and fire protection services, natural resource protection and management, social services, health and other emergency services, economic development and planning, and many other governmental activities. At the end of this calendar year, the Red Lake Band will be completing our third year of operating BIA-funded programs under tribal self-governance authorities.

A December, 1995 study carried out by the Department of Economics, Bemidji (MN) State University, found that approximately 6,130 of our tribal members live on the Reservation in 1,560 households. A majority of Reservation households (59%) have incomes below the federal poverty line for a family of four. Forty percent of all Reservation households receive income from employment with our tribal government, making tribal government jobs the single most important source of income on our Reservation. Our Tribe employs approximately 2,400 workers in its governmental programs and enterprises, for a total annual payroll of about \$17.5 million. In addition, many of our tribal members survive on a traditional subsistence economy of fishing and small-scale timber cutting.

Due in part to our location far from centers of population and commerce, we have few jobs available in the private sector economy. If our members work off Reservation, they necessarily must travel often more than an hour to get to or from their job. While unemployment rates throughout Minnesota have dropped to historically low levels of approximately 2.5%, the Red Lake Reservation unemployment rate remains at an outrageously high level of 65.0%. The lack of good roads, communications, and other necessary infrastructure chronically thwarts economic development and job opportunities.

Specific Information on Red Lake Roads and Bridges

Due to welfare reform and other factors, the population of the Red Lake Indian Reservation is growing much faster than can be accommodated by the present infrastructure. Our infrastructure, and especially our road system, are being “taxed” to the limit. The Red Lake road system consists of approximately 350 miles, which includes approximately 70 miles of paved roads, 60 miles of gravel surfaced roads and 120 miles of earth surfaced roads. We also have approximately 50 miles of state-owned roads on the Reservation. There are no county or township roads on the Reservation, however, there are county and township roads that provide access to the Reservation. Of the 70 miles of paved roads, 40% have surfaces that are beyond their design-life of 20 years. With our expanding population, our gravel and earth-surfaced roads will require complete reconstruction to serve our residents. With the level of funding we currently get, we have to “phase” some of our larger projects into multiple years. We are currently in the last phase of a project that is vital to the economic development of the Reservation and that has required five years of funding to complete. We have been somewhat successful in leveraging state dollars for projects on the Reservation. We have recently completed

construction of one new bridge and will be starting a bike path project on both sides of a state highway that connects our two largest communities on the Reservation. We are currently working with the state on two more bridge projects.

(1) Immediate Statutory Relief Needed to Stop the Diversion of Indian Roads Funds Due to TEA-21's "Obligation Limitation"

Two years ago, Red Lake and other tribes worked hard to convince the Congress to increase funding for Indian roads and bridges during the ISTEA reauthorization process that became TEA-21. The dreadful conditions of our roads provided more than ample justification for a doubling of the funding being allocated to Indian roads. In the end, we received far less than what we needed. We are, however, grateful for what our friends, led by Sen. Domenici, were able to do to increase funding from approximately \$191 million a year nationwide to \$275 million.

However, at the same time, in the same TEA-21 law, a new cut was imposed on our funding that we had never before been subjected to. Because TEA-21 for the first time extended the "obligation limitation" to the Indian roads allocation, we lost about \$25 million of the \$225 million we were promised for fiscal year 1998 and about \$32 of the \$275 million we were promised in fiscal year 1999. We stand to lose even more in fiscal year 2000. Additionally, the 1% set aside that amounted to about \$13 million additional funding for Indian bridge rehabilitation and replacement in ISTEA was removed from TEA-21 and Indian bridge funding now must come out of the IRR funding. The loss of this extra \$13 million in highway bridges set aside funding results in a net loss to the IRR program of \$39 million. While we are grateful for the increases in funding under TEA-21, the obligation limitation, the loss of the bridge set aside funding, and other takedowns has resulted in a paltry \$12.4 million increase to the IRR construction program nationwide.

Here is how the obligation limitation works. The Federal Highway Administration, or FHWA, is required by TEA-21 to withhold a certain percentage (annually varying around 11%) of the total IRR obligation authority amount at the beginning of each fiscal year to be redistributed near the end of that fiscal year to recipients with projects that are immediately ready for funding. However, in expanding the obligation authority withholding provision to the Indian roads allocation, TEA-21 failed to expand the redistribution authority to include Indian tribes. As a result, tribes are barred from sharing in the end-of-year redistribution and so money authorized and appropriated for tribal roads is diverted to states for their general purposes. This is not fair and equitable treatment. We feel that if any funds are withheld from the IRR allocation, they should be redistributed back to the IRR program.

The obligation limitation placed on the IRR funds under TEA-21 is totally inconsistent with all previous transportation statutes. In years past, the Indian roads funds were exempt from the obligation limitation, thus making 100% of the authorized contract authority amount available at the beginning of each year. Red Lake and other tribes sought to have all roads funds made available to them at the beginning of the fiscal year in

the form of advance funding, so that project planning and development and maximum flexibility could occur at the local level when the weather and other conditions permitted rather than having to wait upon a federal fund distribution system that sometimes could delay projects. The Congress agreed and included in TEA-21 a provision to make “all” roads funds subject to P.L. 93-638 and its advance funding authority. However, at the same time the Congress added an obligation limitation that withheld and then diverted some of these funds away from Indian tribes. Clearly, the Congress went three steps forward and two steps backwards with TEA-21, undercutting its forward progress by applying an obligation limitation.

Both the \$275 million promised for Indian roads and the specific dollar amounts listed for the states are a fiction. The actual Indian road funding level is far less than promised, because the obligation limitation provision elsewhere in TEA-21 cuts it back by more than 10%. The actual state funding levels, however, are larger than stated in TEA-21, because the states receive an additional “August distribution” of funds withheld from Indian and other accounts under the obligation limitation. While Red Lake and other Indian tribes are all-too-familiar with receiving the short end of the stick, given our history of dealings with the United States, we object to the continuation of this kind of treatment. A promise is a promise, and as a matter of national honor, promises should be kept by the United States.

Since the obligation limitation provision now withholds funds from tribes and states but redistributes the withheld funds only to the states, a legislative change is necessary to exempt IRR program funds from the obligation limitation withholding: We ask that this obligation limitation be removed and our funding restored to the 100% level as soon as possible through an appropriate amendment to TEA-21. We have attached proposed language for your consideration.

(2) The BIA's Use of Roads Funds Is Mis-Directed

As a Tribal Chairman, I am saddened by the questions I feel I must pose to the BIA. We have seen evidence on several occasions of apparent mis-direction by BIA of Federal highway trust funds for purposes other than Indian roads. We fear we have scraped only the surface of the problem.

On one occasion, Mr. Garrigan was informed that \$200,000 in roads funds were spent to move the entire Minneapolis Area Office (MAO) from downtown Minneapolis to Fort Snelling near St. Paul this year. Of the 30 or so BIA personnel in the MAO, only six work in the roads program. Yet it appears that roads program dollars funded the move of the entire office. If this is the case, why are roads funds supporting other BIA functions?

On another occasion, Mr. Garrigan had the opportunity to observe MAO budgets that indicated BIA has used \$70,000 in roads funds to support a full-time contracting officer position at the MAO. There are now four contracting officers at MAO responsible for all kinds of contracts. It appears that roads funds are being used by the BIA to

support activities unrelated to roads construction. If this is the case, why?

Mr. Garrigan has also been informed that the travel costs of some Area Directors in some Area Offices are regularly charged to and borne by the roads program even though the travel does not appear to be roads-related. If this is true, why is it permitted?

While these allegations are troubling, the bigger problem is that neither Red Lake nor other Indian tribes have been able to get detailed information from the BIA on how it spends the "up to 6%" Indian roads program management funds. This is an especially acute problem, because our roads are in terrible condition and focusing all the funding on actual construction is of critical importance.

For years, the BIA has asked for and received authority in the annual Interior appropriations law to spend on "program management" costs "up to 6 percent" of the Indian roads construction funds transferred to BIA from the Federal Highway Administration.

There are several points I want to make about this so-called "6 percent" money. First, the BIA has always ignored the "up to" part of the law and taken a full 6 percent. Second, the BIA has refused to transfer any of these program management funds to Indian tribes who assume program management functions previously carried out by the BIA with the 6% funds. Third, the BIA has withdrawn greater than 6% of the transferred funds for various program management activities, such as the negotiated rulemaking process, biannual bridge inspections, quality assurance traffic studies, integrated IRR systems development, and town hall meetings. It appears that the BIA was the greatest beneficiary of the increase in TEA-21 funding because it now is applying the 6% to a larger appropriation. We request that this Senate Committee insist upon a full accounting by BIA of its expenditures of these "up to 6 percent" funds. Strict oversight is needed to ensure that all funds are spent for critically needed road construction.

The diversion and questionable use by BIA of critically needed road construction funds aggravates the already deteriorated conditions of our Reservation's roads. As everyone in this room knows, in most cases good roads go right up to, and stop at, the edge of Indian Country everywhere. I refer you to a picture that shows how the road changes as you cross the border into the Red Lake Indian Reservation. This is the case despite the fact that we have one of the most successful tribal roads programs. We have made the most of the funding we have received, and have prepared and approved roads project plans far into the future. What we lack is sufficient funding on an equitable basis compared to that enjoyed by state and county governments.

(3) BIA Barriers Block Tribal Efforts to Negotiate Roads Self-Governance Agreements

Despite express statutory authority and accompanying indications of congressional intent, the BIA has refused to fully incorporate P.L. 93-638, as amended, into the IRR program in both Self-Determination Contracting and Self-Governance Compacts.

P.L. 93-638 was designed to provide for an orderly transition and reduction of the federal bureaucracy in order to give tribes meaningful authority to administer federal programs. Instead, despite the fact that the enactment of TEA-21 expressly applied P.L. 93-638 authorities to TEA-21 funds, the BIA has been increasing its roads staff. Numerous attempts have been made by tribes to contract and compact the IRR program only to fail because BIA refuses to identify its residuals and will not allow tribes to administer the full program.

TEA-21 expressly subjects all IRR funding to P.L. 93-638, as amended, including the 6% used for program administration without regard to the organizational level at which the Department of Interior has previously carried out such programs, functions, services, and activities. In negotiations over self-governance agreements and in TEA-21 Negotiated Rulemaking Committee sessions, the BIA has claimed that the 6% is not available for transfer to tribes. This has meant that there will be an unnecessary duplication of services and failure to transfer funds that should be sent to tribes. Moreover, the BIA has been arguing that it must retain even more funding from tribes by withholding project money to ensure public health and safety. This is clearly a tribal responsibility under P.L. 93-638, as amended, and another attempt by BIA to disregard the congressional mandate.

Year after year, since 1994, Red Lake has devoted considerable time, money, and effort trying to get an extremely resistant BIA to negotiate Red Lake's roads funding into a Self-Governance agreement. It was not until six months ago that the BIA finally agreed to sit down and begin negotiations, and then only because the Congress heeded our request and expressly amended TEA-21 to provide an additional statutory mandate that required the BIA to negotiate. Even at that, we were only able to do a self-governance "demonstration program" that was restricted to only two tribes, one of which was the Red Lake Band.

Getting our self-governance negotiations to begin, we learned, was just the start of what became a long journey. The BIA came up with reason after reason why our proposal could not be approved. The BIA initially said no to advance funding. No to tribal assumption of functions previously carried out by federal officials. No to tribal review and control authority. No to transfer of any of the "up to 6 percent" management funds. No to tribal or third party inspections. The only change the BIA was initially willing to accept was to change the name of our existing Title I roads contract to a funding agreement. The only way we could get the BIA to finally negotiate was to mutually identify the "residuals" and have their staff cost them out. They were quite surprised to see the results.

Our self-governance approach may have posed a threat to the job security of the BIA Area and Central office staff with whom we had to negotiate. We understand how difficult it is for civil servants to negotiate away their own jobs. But we are the ones who pay the gas taxes that provide the roads funds. And these roads funds are appropriated for the purpose of building critically needed roads, not to preserve the jobs of federal workers.

Let me give one example of the unreasonable negotiation demands made by BIA. P.L. 93-638 requires that engineering work done by a tribe be performed by a licensed engineer. We have two licensed road engineers on our tribal roads staff. This requirement makes our staff senior to, and far more credentialed than, all of the BIA engineers at the Minneapolis Area Office. We proposed that Red Lake assume all design and engineering work, including plans, specifications, and estimate approvals under a stewardship agreement with the Federal Highway Administration. We proposed that our work would meet or exceed industry and state standards and be certified by our licensed engineers without further BIA review or approval. The less credentialed BIA staff refused to allow this. They would not even allow us to obtain a third-party (non-BIA) review. We suspect that in large part the BIA adopted this position because it did not want to see responsibilities transferred to Indian tribes that would result in reductions in BIA jobs.

Mr. Chairman, and members of the Committee, we thought these policy decisions were made decades ago with the enactment of P.L. 93-638. But the BIA roads program seems to be the last bastion of the old paternalistic bureaucracy. Indian tribes are building huge buildings and administering complex operations without BIA oversight, but BIA roads staff seem to think tribes cannot build a safe road without a BIA shadow looking over our shoulder. The BIA's approach wastes scarce dollars. We want all of our roads funds to be spent on our Reservation building roads. We don't need or want an expensive BIA bureaucracy second-guessing our every move and wasting 6% or more of our precious roads funds.

Mr. Garrigan learned at the negotiations that the BIA was insisting on withholding more than 6% of our project funds. He reported to our Tribal Council that this meant the BIA negotiators were demanding tens of thousands of dollars to perform functions we have assumed; that the Tribe would do all the work the BIA previously did but that the BIA must still keep most of the money the BIA previously used to do that work because the BIA says it must double-check all of the Tribe's work. In no other area of the Federal-Tribal relationship do we encounter such a degree of paternalism.

The Congress in TEA-21 said "all" roads funds shall be subject to mandates of P.L. 93-638. We need your help in directing the BIA to transfer all funds and authority to requesting Indian tribes.

(4) BIA Conduct Has Frustrated the Work of the Negotiated Rulemaking Committee

I am also concerned by a pattern of conduct by the BIA that has thus far delayed and frustrated any real change from being instituted by the Tribal-Federal negotiated rulemaking committee mandated by TEA-21. Just like the circumstantial evidence in a criminal case, here, too, there is a pattern of prior conduct. There is a motive. And there is a victim -- change has been stymied and the hope for change -- the Negotiated Rulemaking Committee -- has been slowed to a crawl.

According to our Tribal Roads Director who knows from his personal experience,

the BIA roads department has ruled with a heavy hand the construction of roads in Indian country. He has helped us see how the federal bureaucracy is threatened if the rules are streamlined, the regulations simplified, and authority and funds are transferred to the local level. The Negotiated Rulemaking Committee holds the promise of such change.

From the beginning, the BIA overlooked the deadlines in TEA-21 and failed to form the Negotiated Rulemaking Committee until several weeks before its statutory deadline to produce proposed regulations. The BIA placed on the Committee federal roads staff who appear to have taken positions that mostly serve to protect the status quo and resist change.

The BIA assigned staff to assist the Committee who have had surprising difficulty accomplishing basic tasks. For example, they have at times not provided more than five days' notice of where the next meeting is going to take place. They have been unable to find meeting space that is large enough for fifty or sixty people to sit and talk without huge posts in the middle of the room. They have been unable to make sufficient and timely photocopies of basic negotiation materials. They have failed to fax basic negotiation information to tribal technical staff.

The Negotiated Rulemaking Committee was paralyzed for its first five months of meetings by petty disputes raised by federal negotiators over the language of the protocols or rules by which the negotiations were to be conducted. The tribes proposed protocol language similar to that which was adopted by HUD's Federal-Tribal Negotiated Rulemaking Committee on the NAHASDA regulations. But the federal team argued with nearly every sentence. When agreement was finally reached, the BIA representatives promised that the Secretary would sign the protocols on behalf of the Department of the Interior. That promise was withdrawn. The Secretary refused to sign. Federal officials not at the negotiating table insisted on further changes being made to the agreed-upon protocol document. Small matters became vested with strategic importance. The entire negotiation process stalled and weeks were wasted. Red Lake, along with other tribes, was upset by the process and outcome.

Federal members of the Committee, strategically placed on all workgroups, have steadily urged that no change is necessary to the existing rules and regulations. To their credit, the tribal members on the Committee have, for the most part, refused to take this easy way out and instead have insisted on a deregulation and simplification of the present rules. That is requiring great effort, because tribal representatives must negotiate with a federal team that appears to oppose change and to critique every proposal that would alter the status quo. Our present projections are that the Committee will conclude its proposed regulation writing before mid-2000, more than a year behind schedule.

The federal negotiators at the table appear to lack much authority to negotiate. In the chaos that attended adoption of the protocols, their federal superiors sent a clear message to the Committee that important questions will be decided, not in negotiations with the tribal representatives, but instead by federal officials absent from the negotiating

table. This message has made the federal negotiators very tentative and conservative, and has chilled the trust and confidence of the tribal negotiators that what is being negotiated has any connection with what will be the final reality. As you can imagine, this negotiation dynamic fosters neither progress nor creative bargaining. Unless the negotiation tone is dramatically improved, I am increasingly pessimistic about the prospects for the kind of tribally driven change Congress intended this negotiated rulemaking process to bring about.

(5) Equity in Allocating National Highway Funds

In addition to our request for equity regarding the obligation limitation issue, we are also requesting equity in how the Congress and the Administration distribute the overall national highway trust funds. When TEA-21 was being debated on the floor of the House, it was recognized that Indian reservation roads make up 2.63% of all existing roads eligible for TEA-21 funding. However, under TEA-21 Indian tribes receive less than 1% of TEA-21 funding for these roads. If Indian country were to receive its full pro-rata share of the billions included in TEA-21, Indian reservations would have received \$4.7 billion instead of the \$1.6 billion over the six-year period of TEA-21. We often hear that Indians do not pay taxes. But the truth is that every Indian who puts a gallon of gas in his or her car contributes to the highway trust fund. Your assistance in increasing the national allocation to Indian country will be appreciated.

Conclusion

I wish to conclude my remarks with a few personal comments. I was an active tribal representative on the HUD-Tribal Negotiated Rulemaking Committee that successfully wrote the new regulations and formula under NAHASDA. We did it within the timeframes set out in the statute that were similar to those guiding the TEA-21 negotiated rulemaking process.

I am disturbed by the reports given me by the TEA-21 Committee. While rulemaking negotiations are bound to hit bumps in the road along the way, the HUD process worked because federal and tribal negotiators had the authority to make decisions at the table that their superiors on both sides supported.

I wonder whether effective change can ever come through negotiations with an entrenched BIA bureaucracy. And so I would encourage the Congress to give consideration to a statutory transfer of Indian roads program management authority from the BIA to the Federal Highway Administration under strict requirements that tribal governments, consistent with P.L. 93-638, be treated like state and local units of government for purposes of the administration and expenditure of Federal Highway Trust funds. This idea has been around for quite some time. Given the frustrating lessons learned thus far in the negotiated rulemaking experience, it may be time to put the transfer in motion in order to preserve the government-to-government relationship between Indian tribes and the United States.

Thank you for this opportunity to provide this testimony. Both Mr. Garrigan and I are available to answer any questions you may have.